PETITIONERS' ARGUMENT

Supreme Court of the United States

OCTOBER TERM, 1941

No. 619

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA, RESPONDENTS.

PETITIONERS' ARGUMENT

JOHN M. DANIEL,
Attorney General,
Columbia, S. C.,
CLAUDE K. WINGATE,
Columbia, S. C.,
Attorneys for Petitioners.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

INDEX

	Page
Opinions Below	1
Statement	3
Argument	5

TABLE OF CASES CITED

	Page
Curry v. United States et al., 62 Sup. Ct. Rep., 49	20
Keane v. United States, 272 Fed., 577, 580	10
Pan American Petroleum Corp. v. State of Ala., 67 Fed. (2d), 590	16, 17
Panhandle Oil Co. v. State Miss., 227 U. S., 218, 48 Sup. Ct. Rep., 451, 72 Law Ed., 857, 56 A. L. R., 583	18
Standard Oil Co. v. Cal., 291 U. S., 242, 54 Sup. Ct. Rep., 381	18
State of Alabama v. King & Boozer et al., 62 Sup. Ct. Rep., 43	19, 20

STATUTES INVOLVED

Judicial Code U. S., Section 240 (a), as Amended	2
S. C. Code, Sections 2527-2557	3
Acts of S. C., No. 861, 1938	7
Acts of S. C., No. 574, 1928	7
Act 76th Congress, No. 819	3

MISCELLANEOUS

Army Regulations, No. 210-65, Paragraph 48	11
Army Regulations, No. 210-65, Sub-sec. e of Sec. 80, pages 44-45	16
Senate Report, Cal. No. 1692, Report No. 1625, 76th Congress 3rd Session	6
Excerpt from Collier's Magazine, June 27, 1941, page 23	15

PETITIONERS' ARGUMENT

Supreme Court of the United States

OCTOBER TERM, 1941

No. 619

WALTER G. QUERY, JOHN P. DERHAM AND JOHN G. RICHARDS, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, PETITIONERS,

versus

UNITED STATES OF AMERICA, MAJOR GENERAL HENRY D. RUSSELL, UNITED STATES ARMY, INDIVIDUALLY AND AS COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, AND MAJOR WILLIAM R. TOMY, UNITED STATES ARMY, INDIVIDUALLY AND AS POST EXCHANGE OFFICER, FORT JACKSON, SOUTH CAROLINA, RESPONDENTS.

This case is before this Court by reason of petition for writ of *certiorari* having been granted on April 14, 1942. It is an appeal from the Circuit Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of South Carolina is reported in 37 Federal Supple-

ment, 972. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 121 Federal (2d), 631.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

Respondents' action is to secure a permanent injunction against petitioners enforcing the provisions of Act No. 574, Acts of the General Assembly of 1928, as amended, incorporated in the Code of 1932 as Sections 2527-2557, inclusive, levying a sales tax on certain commodities sold, or distributed, in South Carolina when such sales or distributions are made by army post exchanges, navy ships' service stores and marine post exchanges.

There is also involved in this action, Act No. 861, Acts of the General Assembly of South Carolina, 1938, levying a use tax on certain commodities used in South Carolina when such commodities have not theretofore been subject to the sales tax or upon which the sales tax has not theretofore been paid.

Also involved in this action is whether or not under the provisions of Act No. 819, 76th Congress, 3rd Session, army post exchanges, naval ships' service stores and marine post exchanges are instrumentalities of the United States.

The District Court held that army post exchanges, ships' service stores and marine post exchanges were instrumentalities of the United States, not by reason of any Congressional authorization or requirement, but by reason of Army Regulations permitting superior officers to establish these organizations wherever needed. This decision of the District Court was affirmed by the Circuit Court of Appeals for the Fourth Circuit.

Respondents, other than the United States, are engaged in the business of operating general merchandise stores in South Carolina, some of these stores being operated on and some off Federal reservations. These general merchandise stores are owned exclusively by the personnel of the army, navy and marine; they sell, among

other things, certain commodities, such as cigarettes, tobacco products, soft drinks, beer and wine, which are subject to a sales tax under the South Carolina law. These commodities are also subject to a use tax, if when used they have not theretofore borne the sales tax. None of these taxable commodities are necessary for the personnel to have in order that they may properly carry out their official duties and functions to the Federal government.

The only exemption contained in the Act of Congress removing the immunity from these taxes on Federal reservations is on sales by the United States, or its instrumentalities. The only exemption contained in the South Carolina law is on taxable commodities when sold to the United States.

The assigned error intended to be urged is the holding of both the District Court and the Circuit Court of Appeals that army post exchanges, navy ships' service stores and marine post exchanges are instrumentalities of the United States and not subject to the South Carolina sales tax.

ARGUMENT

The District Court for the Eastern District of South Carolina and the Circuit Court of Appeals for the Fourth Circuit held that post exchanges, ships' service stores, marine post exchanges, officers' clubs and non-commissioned officers' clubs are instrumentalities of the United States.

In view of this holding, we feel that the only question involved in this case is whether or not these organizations, when operated on or off Government reservations, are instrumentalities of the United States?

In the beginning of this argument we would like to give the Court a history of the development and reason for the passage of the Act of Congress hereinafter referred to.

For many years post exchanges were operated on military reservations which had been ceded to the United States and, therefore, beyond the reach of the State in which geographical bounds such organizations operated.

There was such a wide abuse of the immunity of these organizations from sales or use tax by reason of their operation on Federal reservations that some seven or eight years ago representatives from more than twenty states appeared before the Congress and appealed to it to enact legislation which would not only cure these abuses, but would also permit the states to collect their sales or use tax on taxable commodities sold by these organizations of the army and navy personnel.

The result of the appeals made to Congress by the various states was the enactment in 1936 of a Federal Statute requiring post exchanges, and similar organizations, operating on Federal reservations, to make returns and pay to the state in which they were located gasoline taxes on all gasoline not sold to the United States. Since the approval of that Act post exchanges and similar organizations

in South Carolina, in compliance with the statute, have been making returns and paying the gasoline tax to the South Carolina Tax Commission on all gasoline sold by them to persons other than the United States.

During the year 1939 a Bill was introduced and passed by the national House of Representatives removing the immunity theretofore enjoyed by persons or organizations selling or using taxable commodities within a Federal area, only exempting the United States and its instrumentalities. This Bill then went to the Senate of the United States where it was slightly amended and passed by that legislative body over the protest of the army and navy departments and with the sanction and approval of tax representatives from at least twenty-six states of the Union.

It is our information that other protests and appeals were made by these departments to the President to veto this statute, but instead it was signed by the President on October 9, 1940, and became operative on January 1, 1941.

It is interesting to observe that this Bill was introduced in the House of Representatives by Representative Buck, of California, in whose district is situated Mare Island Navy Yard, and it is our information that it was on account of the abuses there and the large loss of revenue to the state of California by the operation of these general stores, owned exclusively by the personnel of the navy, that prompted Representative Buck to introduce and foster this legislation.

The Congress refrained from defining a post exchange or other similar organization. Of course ships' stores or commissaries operated by the United States are not here in controversy. In its report the committee of the Senate, Calendar No. 1692, Report No. 1625 of the Senate, 76th Congress 3rd Session, had the following to say with reference to post exchanges, and similar organizations:

"For example, tangible personal property purchased from a commissary or ship's store by an Army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store, is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the State income taxes by virtue of section 2 of the committee amendment."

Under the various revenue laws of South Carolina, Act No. 574, of the Acts of 1928, as amended, the pertinent portions of which are printed in the Record, page ..., tobacco products, beer, wine, soft drinks, alcoholic liquors, and playing cards are subject to a sales tax when the sale thereof takes place within South Carolina, the only exemption contained in these State Statutes being when such commodities are sold directly to the United States. In addition to the sales tax, Act No. 861, of the Acts of 1938, there is a use tax on tobacco products, playing cards, cartridges and shells used or consumed in this State, when such commodities have not theretofore borne the sales tax, Record, page ....

It will be borne in mind that the Act of Congress, above referred to, removes the immunity from State sales or use tax on sales or use of commodities on Federal reservations,

and exempts no person, firm or corporation except the United States or its instrumentailities.

In view of the language of the Act of Congress, it is our view that the only material question to be determined in this case is whether or not post exchanges, officers' clubs, non-commissioned officers' clubs, and similar organizations, of the army and navy personnel, regardless of where such organizations may be situated, are instrumentalities of the United States.

It is our contention that these organizations being purely voluntary, owned by the personnel, operated for their pleasure and convenience, and all profits being used directly or indirectly for the benefit of such personnel, and no requirement for their operation, they are not instrumentalities of the United States Government and exempt from State taxation.

As we understand the law, an organization which could be legally termed an instrumentality of the United States must find its origin and right to exist under some Act of the Congress. We have found no such Act permitting or requiring the establishment or operation of such organizations as are here under consideration. They are operated solely and exclusively by permission of the commanding officers of the area involved.

The mere fact that they are operated in some instances in Government owned buildings would not create them an instrumentality of the United States. In fact, under the Army Regulations (copies of which are in the hands of the Court) oftentimes the exchanges and similar organizations construct their own buildings from their own funds and when so constructed the buildings become the property of the exchange.

These organizations of the army and navy personnel, operated for their own pleasure, convenience and profit, are

in no sense of the word instrumentalities of the United States, but as inferior Courts have said many times, are voluntary unincorporated cooperative associations, more or less partnerships among the personnel of the army and navy and operated under permission granted by the commanding officers, by, for, and on behalf of the personnel of the army and navy departments.

"In this connection, the counsel for the Government, in his brief and argument, insists that post exchanges are governmental institutions, associations, and agencies, and says:

" 'It cannot be denied that such agents are established under regulations promulgated and established by the War Department.'

"He refers us to Section 161 of the revised Statutes (Comp. St. Section 235) for the authority of the Secretary of War to make such regulations with reference to these exchanges. The Section reads as follows:

" 'The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.'

"This section only gives the heads of departments, including the Secretary of War, power to issue rules and regulations for the administration of their departments. Indeed, the power conferred by this section is administrative only (*U. S. v. George*, 228 U. S., 14, 33 Sup. Ct., 412, 57 L. Ed., 712), which means that the Secretary of War, if he had power to issue the regulation at all, only had power to compel or permit the soldiers to establish these post exchanges in question, but could not, in the absence of the express authority of Congress, make persons not connected with his department bound by such regulations, or subject to the pains and penalties of criminal law. If a head of a department

has the power to make rules which subject classes of property to forfeiture and classes of persons to penalties, that power must be expressly given him by Congress, and well defined, so as to make his rule or regulation an act of the supreme law-making body. He will get no such power from Section 161 of the Revised Statutes, *U. S. v. 11,150 pounds of Butter,* 195 Fed., 657, 115 C. C. A., 463."

Keane v. United States, 272 Fed., 577, 580.

There are many activities, including the operation of barber shops, on the reservations in South Carolina in buildings owned by the United States, and it is our information that a portion of the receipts from these concessions must go to the organizations which they serve, and yet it would be absurd to say that a barber shop operated by an individual under permission of the commanding officer of the area involved becomes an instrumentality of the United States and not subject to State taxation merely because it was being operated in a government building and a portion of the receipts under the concession granted should go to the organization served.

Under the regulations by which these organizations are established, there being no Act of Congress permitting or directing the establishment thereof, the United States furnishes no funds with which to buy the stock of merchandise, to begin the operation of the organization, nor does the United States furnish any funds with which to replenish such stock. The United States does not extend any credit, nor is it liable for any debts made by post exchanges, and in no manner share in the profit derived from the operation thereof. According to the regulations under which permission is granted to organize these general cooperative stores, even the fixtures therein are purchased with funds of the organization, or furnished by the merchants making sales to such organizations. The title to the stock of merchandise,

fixtures and all buildings which are erected with post exchange funds, is never in the United States; but, on the contrary, is the sole property of the exchange purchasing or erecting the same. When the personnel of an exchange moves from a reservation it may remove any building it has theretofore erected.

We call special attention of the Court to paragraph 48 of Army Regulations No. 210-65, which is as follows:

> "48. Funds for establishing.—a. The expense of fitting up the quarters of an exchange and procuring the necessary articles for the first stock and fixtures will be met by assessment from the funds of the several organizations which make up the membership of the exchange, or these will be contracted for, or procured on credit. When procured on credit, the bills will be paid from the first profits. The post exchange is responsible for the debt, and not the Government. This will be made perfectly clear to those extending credit.
>
> "b. The funds for the establishment of exchanges in the field will be drawn from the funds of participating organizations. Such funds will normally originate in large part from the liquidation of interests in exchanges at the home station of such organizations. A reasonable portion of the funds of organizations will, therefore, be held available for the establishment of field exchanges. The sum thus held will normally be not less than one dollar ($1) for each man of the authorized strength of the organization."

It is clear from this regulation under which post exchanges, and other similar organizations begin operations, that all expenses incurred in connection therewith are either secured by credit extended to the exchange, or by assessment of the personnel of the organizations which make up the membership of the exchange.

If there is any profit made from the activities carried on or sales made by exchanges, and similar organizations,

such profit does not inure to the benefit of the United States, but to the personnel composing the membership of such organizations. If in turn liabilities are incurred, they are against the membership of the exchanges and not against the United States. Paragraph 72 of Army Regulations No. 210-65, specially provides that funds of a post exchange are not public funds, therefore, such funds belong to the exchange, which is a partnership, and in turn actually belong to the personnel making up the membership of the exchange.

None of the commodities subject to the sales or use tax of South Carolina are necessary for the personnel to have in order that it may carry out its functions and obligations to the United States, but are only luxuries sold by these stores for the pleasure and convenience of the personnel.

As for officers' clubs, we find no army regulations pertaining to such clubs. No such regulations have been mentioned by respondents or by the Court. It seems that officers' clubs are organized without regulations. A crowd of congenial officers get together and organize an officers' club for the purpose of securing their meals, which they pay for themselves, at a nominal cost, and for the sale and distribution of luxuries which they may desire. These luxuries include alcoholic liquors which, under Federal law, it is unlawful to sell or distribute on military reservations. These officers' clubs are not necessarily located on government reservations. In fact there is one located in the City of Columbia on Hampton Street only a few blocks from Main Street.

We can see no sound difference between the army personnel operating an exchange, or an officers' club, for its convenience, than the employees of the post office or Internal Revenue Departments in Columbia operating an ex-

change for their pleasure and convenience for both would be operating a general merchandise store owned by themselves and entirely for their pleasure and convenience.

As a matter of fact, petitioners have been requested from time to time to permit the operation of such stores by the personnel of the Internal Revenue Departments and the United States Post Office and permit them to sell taxable commodities free of either the sales or use tax of South Carolina.

If we should view the State as a whole, we would find that there are many United States employees or personnel of the United States Government who could organize themselves into a partnership, the same as exchanges are organized, and defeat the State from collecting its lawful revenue by selling taxable commodities and calling themselves or their organizations instrumentalities of the United States. There is no Act of Congress authorizing such organizations by the personnel of the Postal Department, the Internal Revenue Department, the Army, or the Navy Department.

We can see no sound difference in the army and navy personnel organizing partnerships among themselves under regulations of superiors for the purpose of operating a general merchandise store, than that of any other unit of Federal employees doing likewise and calling their organizations instrumentalities of the United States. The mere fact that the organizations thought themselves instrumentalities of the United States Government does not mean that they are such, as a matter of law.

There is no sales or use tax in South Carolina on the sale or use of any commodity which is necessary, but only upon those luxuries which are often desired by people.

If any of the commodities sold by or distributed by exchanges and taxable under the South Carolina law were

necessary for the personnel to have in order that it might properly carry out its official functions and duties to the army and navy, the United States would furnish such items. It may not be amiss to say at this juncture that the Federal tax on such commodities as are taxable under the revenue laws of the United States, and which are distributed and sold by exchanges are collected by the Federal Government, whether it be a sales or manufacturer's tax.

Paragraph 77 of Army Regulations, No. 210-65, provides that exchanges are, in a sense, associations of military personnel for business purposes and that as such are subject to the stamp tax imposed by the Internal Revenue Statute and such exchanges are not permitted to sell or distribute such commodities upon which special stamps are required until such stamps have been affixed. The only possible conclusion which can be drawn from such regulation is that post exchanges composed of the personnel of the units participating therein are business organizations for the purpose of doing a general merchandise business.

We repeat that a post exchange is a voluntary unincorporated cooperative store, at, near, or on a government reservation, the commanding officer thereof giving such privilege or permission to form such cooperative store. The purpose of such cooperative store is to supply, by sale, the personnel at reasonable prices such articles desired by them which are luxuries, not necessary and not furnished by the government, the profits which are used for the sole pleasure and convenience of the personnel.

It is absurd to say because a number of officers attached to units at Fort Jackson, but living in the City of Columbia, organize an officers' club, located within the City of Columbia, and there have their gatherings, social or otherwise, sell and distribute alcoholic liquors, beer, wine, tobacco products, or other commodities subject to

the South Carolina Sales or Use Tax, and because they are officers of the United States Army, the State could not collect its tax on these items.

The size attained by post exchanges is briefly shown in the following excerpt from Collier's Magazine for June 27, 1941, at page 23:

> "Post Exchange Officer Maj. H. E. McGaffey, called from retirement after twenty-four years in the Army and ordered to set up Blanding's canteens, launched the business last November 9th in a one-room building with an operating force consisting of himself, four noncoms, one private, one light truck and of capital not a red cent except $60 of his own which he converted into change. Today the P-X employs 440 civilians and 198 soldiers, has an $18,500 pay roll every fifteen days, sells around $350,000 worth of merchandise every month and turns over its entire stock every twenty days. It's an enterprise for which almost any business man would sell his soul. The P-X operates the Central Exchange, which serves as headquarters; thirty-five canteens (one for each regiment); three warehouses, eight trucks, thre bus terminals, seven taxis, eight public filling stations, a garage, a restaurant, four cafeterias and a privately operated shoe repair shop."

The above quotation is used for the purpose of argument and it clearly shows the enormous size a post exchange, or other similar organization, can attain, none of the profits of which ever inure to the benefit of the United States.

In connection with the article above referred to, we should call attention to another paragraph of the Regulations. The Regulations provide the same definition of post exchanges that we are here contending for, and the same as has been applied by the Courts many times.

These Regulations, in effect, say to the organizations desiring to operate post exchanges, or similar organization, you may do so, but they must be operated under certain rules and restrictions. As we see it, among the purposes of the restrictions are: That only a sufficient number be operated to be profitable. No one be allowed to graft or steal from the exchange. That exorbitant prices be not charged for the commodities sold. That civilian employees be not paid exorbitant salaries at the expense of the members. And that the business be run on a paying basis.

> "e • • • A post exchange is a voluntary unincorporated cooperative association of Army organizations, a kind of cooperative store, in which all share in the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a post exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of an inability on the part of a post exchange to pay its debts, the organizations which participate in the post exchange should themselves pay off all such obligations in proportion to their respective interest in the exchange."
>
> Army Regulations No. 210-65, Sub-section e, of Section 80, pages 44-45.

The Act of Congress, above referred to, we might say, ceded back to the States the power and authority to levy and collect sales or use, or income taxes on Government reservations. Since this has been done by the Congress, it makes no difference if these clubs, exchanges and other similar organizations, are located on or off reservations, they are subject to the South Carolina sales or use tax.

The decision of the District Court and the Circuit Court of Appeals in the instant case is in direct conflict with the decision in the case of *Pan American Petroleum*

Corporation v. State of Alabama. Certiorari was denied by this Court in that case.

It seems to us that if there had been any serious doubt in the minds of the Supreme Court that post exchanges were not instrumentalities of the United States, *certiorari* would have been granted in order that this most important question be finally settled. Under the decision in that case Alabama was permitted to collect taxes on taxable commodities sold to post exchanges at Camp McClellan.

"(3, 4). It is to be conceded that an excise tax on the sales of gasoline is inoperative as to sales made to the United States, either directly or indirectly through one of its departments, for government use. *Panhandle Oil Company v. State of Mississippi*, 277 U. S., 218, 48 S. Ct., 451, 72 L. Ed., 857, 56 A. L. R., 583. There a sale of gasoline was made direct to the United States for the use of the Coast Guard and a government hospital. No doubt the ruling would have been the same if the sales had been made directly to these instrumentalities of the government, for then also the United States would have been the real purchaser. But the tax here is not on the sale but is on the withdrawal of the gasoline. Furthermore, a post exchange is, of course, not the government, nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges at Camp McClellan and Maxwell Field are not exempt from the state excise taxes."

Pan American Petroleum Corporation v. State of Ala., 67 Fed. (2d), 590;

Certiorari denied February 12, 1934, 291 U. S., 670, 54 Sup. Ct. Rep., 454.

Until the decision of the Circuit Court of Appeals in the instant case, the above decision was the latest expression of a Circuit Court of Appeals on the question here involved. The Court said, and we think correctly so, that post exchanges, or similar organizations, were purely private organizations for the pleasure and convenience of the personnel making up the organizations, and we submit if they are, the territorial immunity having been removed by the Act of Congress, South Carolina sales and use taxes apply to the sale or use of taxable commodities at such exchanges.

In the case of *Panhandle Oil Company v. The State of Mississippi.* the Court was divided five to four in refusing to allow the State of Mississippi to collect a sales tax on gasoline sold to the Veterans Administration for the use of a government hospital and to the Coast Guard for its use. Justice Holmes wrote a very strong dissenting opinion concurred in by three other justices. In that case there was no question as to instrumentalities of the Federal Government, inasmuch as both purchasers involved were not only instrumentalities of the United States, but were actually departments of the United States, or, we might say, the United States itself.

Panhandle Oil Co. v. Miss., 227 U. S., 218, 48 Sup. Ct. Rep., 451, 72 L. Ed., 857, 56 A. L. P., 583.

In the case of *Standard Oil Company v. California,* the Supreme Court of California held that post exchanges located on the Presidio were subject to gasoline taxes levied under the California law. The Supreme Court reversed this decision not upon the ground that post exchanges were instrumentalities of the United States, but upon the ground that California had no jurisdiction over the Presidio which had been ceded to the United States.

Standard Oil Co. v. Cal., 291 U. S., 242, 54 Sup. Ct. Rep., 381.

We feel sure that the decision in that case would have been entirely different had Congress permitted California to levy a sales or use tax within the reservation as it has now done by the Act of Congress here in question.

The District Judge in his opinion laid great stress upon the case of *New York, Ex Rel, Rogers v. Graves,* 299 U. S., 401, 57 Sup. Ct. Rep., 269, stating that the Supreme Court held the Panama Railroad Company to be an instrumentality of the United States by reason of an executive order of the President, dated February 6, 1934.

That decision has since been overruled by this Court and is, therefore, no longer the law. As we understand it, the reason for the overruling of that decision was that a tax against an employee of the Panama Railroad Company, or any other employee of the United States, or any of its instrumentalities, could not in any wise interfere with the United States.

Any tax which might be imposed by South Carolina upon the sale or use of taxable commodities by post exchanges, or similar organizations within South Carolina, could not in anywise directly or indirectly affect or burden the United States, because such tax would necessarily be paid by the purchasers, or from funds of the post exchange which funds belong to the personnel operating the same.

We think that the recent case of *State of Alabama v. King & Boozer et al.,* 62 Supreme Court Reporter, 43, in which it was held that the sales tax levied under the Alabama Statute was applicable to "cost plus" a fixed fee contract with the United States, certainly would be applicable here. In that case the Court said:

> "But however extensively the government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the

contractors the status of agents of the Government to enter into contracts or to pledge its credit. See *United States v. Algoma Lumber Co.*, 305 U. S., 415, 421, 59 S. Ct., 267, 270, 83 L. Ed., 260; *United States v. Driscoll*, 96 U. S., 421, 24 L. Ed., 847. It can hardly be said that the contractors were not free to obligate themselves for the purchase of material ordered. The contract contemplated that they should do so and that the Government should reimburse them for their expenditures. It is equally plain that they did not assume to bind the Government to pay for the lumber by their order, approved by the contracting Officer, which stipulated that it did not bind or purport to bind the Government. The circumstance that the title to the lumber passed to the Government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract."

State of Alabama v. King & Boozer et al., 62 Sup. Ct. Rep., page 43.

See also *Curry v. United States et al.*, 62 Sup. Ct. Rep., page 49.

Clearly the Government furnishes no money with which to purchase the original stock of merchandise for these post exchanges, neither does it extend any credit. Any purchases made or credits extended are by and to the post exchange and it alone is liable therefor. At no time does the Government ever come into possession of any of the property purchased by or owned by a post exchange; and, if we may repeat, any taxation of the post exchange, or similar organization, could not in anywise impede, retard, or affect the operations of the United States.

In the last above-cited case, the Government reserved the right to restrict and control the action of the contractor, yet the contractor was held not to be an instrumentality of the United States and exempt from the Alabama sales tax even though that tax would necessarily add to the cost to

the Government in completing a camp site, or other buildings necessary for its use.

We have no such result in the instant case. Here a general cooperative store is organized by the personnel of a particular unit and is termed a post exchange, officers' club or non-commissioned officers' club. When this organization is set up, it makes its own purchases of commodities it desires to sell at retail or otherwise; it either furnishes the cash for the purchase thereof, or such is secured on the credit of the organization. When such purchases are made, the title to the goods, wares or merchandise is in the organization making the purchase. At no time does the United States have title thereto. After the goods are received, sold, and the cash received therefor, the United States has no title to the cash, but the same belongs to, and is the property of the organization making the sales.

It is true that under the regulations, under which these organizations operate, certain army officers have control over the operation of the mercantile business, but, as was said in the last above-cited case, it makes no difference if the Government itself, rather than the officers, reserves the right to restrict or control the actions and functions of the post exchange, this would not convert it into an instrumentality of the United States and exempt from State taxation.

If this Court should not declare these organizations of army and navy personnel for their own pleasure, interest and profit, to be private, cooperative mercantile establishments, then they can be established and operated anywhere in South Carolina, even on the main street of its principal cities and be free from any taxation by the State.

The tax attempted to be levied and collected by the petitioners under valid South Carolina Statutes is a non-dis-

criminatory tax on the sale or use of certain non-essential commodities within this State. Under the terms of these Statutes every person making a purchase or using these non-essential commodities is placed in the same class, the only exemption being on sales or uses by the United States.

We have, heretofore, shown that the Federal Government has no pecuniary interest in the operations of post exchanges, or similar organizations, therefore, no burden directly or indirectly could be placed on the Federal Government by the levying and collection of this tax which automatically would be passed on to the purchaser and the consumer.

It will be borne in mind that the State of South Carolina is only attempting to levy and collect a tax in accordance with its revenue laws on the sale or use of taxable non-essential commodities sold or used by post exchanges, or similar organizations, whether or not they be operated on or off Federal reservations. In no case would there be any attempt on the part of this State to collect a tax from the United States, neither is the State attempting to regulate the sales nor collect a license fee for the privilege of doing business. The reason for the State not attempting to do this is that the Act of Congress, as we understand it, has only ceded back to the State the right to collect a sales, use, or income tax on territory formerly ceded to the United States and, therefore, immune from State taxation, except by permission of Congress.

We submit that these organizations are not in any sense of the word instrumentalities of the United States, and the right of the State to tax on ceded territory having been given back to the State under the Buck Act, the State may lawfully tax any sale or use of tangible personal prop-

erty on Federal reservations, except where the sale or use is by the United States or its *bona fide* instrumentalities.

Respectfully submitted,

JOHN M. DANIEL,
Attorney General,
Columbia, S. C.,

CLAUDE K. WINGATE,
General Counsel, South Carolina
Tax Commission,
Columbia, S. C.,

Attorneys for Petitioners.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.